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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ILLINOIS STATE BOARD OF ELECTIONS, et al.,
Petitioners,

v.

DENNIS J. HASTERT, et al.,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Where the litigation's actual controversy is between competing plaintiffs, whether a plaintiff who succeeds against opposing plaintiffs is entitled to prevailing party status against a nominal and neutral state defendant for purposes of attorney's fees?

If the plaintiff is eligible for attorney's fees from the neutral and nominal defendant, whether the district court is precluded from denying fees on special circumstances grounds?

LIST OF PARTIES

The Petitioners, in these five consolidated cases on appeal, are the Illinois State Board of Elections (also sued as the Illinois State Board of Election Commissioners), and its members John J. Lanigan, Theresa M. Petrone, Judith A. Jones (replacing Richard A. Cowen), Lawrence E. Johnson, David E. Murray, Langdon D. Neal, Wanda L. Rednour, and Hannelore Huisman.

The Respondents, grouped by separate district court filings, are:

1. Dennis J. Hastert, Harris Fawell, John E. Porter, Phillip M. Crane, Henry J. Hyde, Robert H. Michel and Thomas W. Ewing—No. 91 C 4028;

2. Johnny Scott and Ben Howard—Intervenors in No. 91 C 4028;

3. Wilfredo Nieves, Al Johnson, Linda Coronado, Bobby Rush, Jesus Garcia, Rev. Willie Barrow, Rafael Boria, Miguel Del Valle, Robert L. Lucas, Leon D. Finney, Jr., Rev. Clay Evans, Joseph Gardner, Luis V. Gutierrez, Regner Suarez, Joseph Berrios, Miguel A. Santiago, and Neomi Hernandez—No. 91 C 4154;

4. The Chicago Urban League, Craig R. Collins, Mark Allen, and Nikolas C. Theodore—No. 91 C 5472; and

5. Ann Rosebrook, Daryl Barklow, Amiel Cueto, Richard Mark, Jeanelle Norman, Carolyn Toney, Lee Babcock, Raymond Oliver, Barbara Poshard, William Matthews, Gerald Hawkins, and Eva Savala—No. 91 C 4656.

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PETITION FOR WRIT OF CERTIORARI

The petitioners, Illinois State Board of Elections and its named members, respectfully pray that a writ of certiorari issue to review the decision of the Seventh Circuit Court of Appeals.

OPINIONS BELOW

The Court of Appeals' June 1, 1994 modified opinion on rehearing (App. 1-29) is not yet officially reported. Its earlier December 17, 1993 decision on attorneys' fees (App. 30-53) has been superseded.

The three-judge district court panel issued a published decision on attorneys' fees on January 17, 1992, *sub nom. Hastert v. State Board of Elections*, 794 F. Supp. 254 (N.D. Ill. 1992) (App. 55-66). Separate unpublished orders

on attorneys' fees were entered with respect to one plaintiff group (Rosebrook plaintiffs) on December 27, 1991, January 7, 1992, and January 21, 1992, all of which are reproduced in the Appendix (App. 67-69).

The underlying judgment on congressional redistricting was entered on November 11, 1991, by the district court panel and may be found *sub nom. Hastert v. State Board of Elections*, 777 F. Supp. 634 (N.D. Ill. 1991).

JURISDICTION

The judgment of the Seventh Circuit Court of Appeals was first entered on December 17, 1993, and, upon timely petitions for rehearing, a modified opinion was issued on June 1, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

42 U.S.C. § 1988(b):

> (b) In any action or proceeding to enforce a provision of section 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, the Religious Freedom Restoration Act of 1993, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. § 1973*l*(e):

> (e) In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

Following the 1990 census, these consolidated actions were brought in district court by several plaintiff groups to effectuate the congressional redistricting of Illinois. The three-judge district court panel possessed jurisdiction under 28 U.S.C. § 1331 (general federal question jurisdiction), 28 U.S.C. § 1343 (civil rights and voting rights jurisdiction), and 28 U.S.C. § 2284 (congressional apportionment matters convened before three-judge district court). The defendants, the Illinois State Board of Elections and its members, are seeking review of the propriety of their liability for the attorneys' fees of four plaintiff groups—relief which the district court had denied.

The Congressional Redistricting Action

The results of the 1990 census, issued to the Governor of Illinois in 1991, dictated that Illinois' representation in Congress would be reduced from 22 members to 20 members. At that time, the Illinois State Board of Elections was subject to the terms of a 1981 federal court order, establishing a congressional district plan with 22 districts, including three "super-majority" African-American districts (the 1st, 2nd, and 7th Illinois Congressional Districts). *See Hastert v. State Board of Elections*, 777 F. Supp. 634, 637-38, 646-47 (N.D. Ill. 1991) ("*Hastert I*") (the underlying congressional redistricting decision). Redistricting Illinois would have a potential impact on the tenure of the 22 incumbent Congressmen, due both to the reduction in House membership and to changes in district boundaries. A new map also could affect the relative strength of the Democratic and Republican delegations, and the contours of African-American districts in proximity to the new Hispanic "super-majority" district.

The Illinois General Assembly did not redistrict Illinois under the new census before its adjournment in July of 1991. Beginning June 27, 1991 and over the next few months, five lawsuits were filed in federal district court by interested plaintiff groups, naming the Illinois State Board of Elections and its members as defendants (hereafter "State Board"). Seven individuals and/or organizations also were granted leave to intervene in the actions that were consolidated. *See Hastert I*, 777 F. Supp. at 638-39. Generally, the plaintiffs' actions requested a declaration that the 1981-configured Illinois congressional districts were unconstitutional due to the census results and sought to enjoin the defendant State Board from conducting the 1992 elections under the 1981 court-ordered districting plan.

As detailed below, two plaintiff groups, proposing statewide redistricting plans, represented the interests of the Republican and Democratic Parties and incumbents; the other parties raised more local concerns. There were five plaintiff groups involved in the redistricting litigation who also were before the Court of Appeals on the attorneys' fees issue:

- the "Hastert" plaintiffs are the Republican Party members of Congress, Representatives Hastert, Fawell, Porter, Crane, Hyde, Michel and Ewing (R. Doc. 1 & 61), who proposed the statewide "Republican" map;[1]

[1] Upon consolidation, the majority of filings with the district court were docketed under the *Hastert* file, Case No. 91 C 4028. Record citations to these documents will not include a case number, as above. The citations to any pleading docketed under another file will be preceded by the appropriate case number.

- the "Nieves" plaintiffs are a group of Hispanic and African-American voters (including Chicago aldermen and future Congressmen Luis Gutierrez and Bobby Rush, as well as another Chicago alderman and two state legislators) who submitted a proposed redistricting map for the four minority districts in Chicago (No. 91 C 4154, R. Doc. 1 & 13);
- the "Rosebrook" plaintiffs are a group of voters representing the interests of the Democratic Party members of Congress, who advocated for a statewide "Democratic" map. (No. 91 C 4656, R. Doc. 1 & 7). Democratic Congressmen Durbin, Costello, Bruce, Cox, Poshard, Sangmeister and Evans were billed for the legal services provided to the Rosebrook plaintiffs (R. Doc. 244; Ex. P in Vol. 6 of Loose Pleadings);
- the "Chicago Urban League" plaintiffs also represent the interests of the existing African-American districts and submitted a proposal for the four minority districts (No. 91 C 5472, R. Doc. 1); and
- the "Scott" intervenors are Johnny Scott and Ben Howard, individually and as representatives of the St. Clair County and Madison County, Illinois, National Association for the Advancement of Colored People ("NAACP"), who intervened in the action to oppose an early draft of the Hastert/Republican statewide map (R. Doc. 111 & 115).

See also Hastert I, 777 F. Supp. at 638-39.[2]

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[2] Other parties before the district court (but not the Court of Appeals) were the "Collins" plaintiffs, including Representatives Cardiss Collins and Charles Hayes of the 7th and 1st Congressional Districts, as well as the following intervening parties: Rep. Frank Annunzio (11th District); Rep. Sidney Yates (9th District); Rep. Augustus Savage (2nd District); the Harold Washington Party; and residents of the 3rd Congressional District. *Hastert I*, 777 F. Supp. at 638-39.

On September 19, 1991, the State Board filed a motion to dismiss the action, setting forth the scope of its responsibilities for elections and its lack of authority or duty under federal or state law to draw congressional district boundaries. (R. Doc. 83).[3] The State Board acknowledged that it was bound by the terms of the 1981 redistricting order and represented that it would implement any valid redistricting plan of the legislature or court; however, the State Board "lack[ed] the capacity or legal interest to be an adversary in this cause." (*Id.*).

At a September 20, 1991 hearing, the district court denied dismissal but, without objection from any of the plaintiffs/intervenors, it granted the State Board's alternative request for relief and ordered that the Board's sole participation in the litigation would be to implement the judgment. (R. Doc. 86; *Hastert I*, 777 F. Supp. at 639; *see also* App. 57-58). The State Board played no further role in the proceedings until it responded to post-judgment petitions for attorneys' fees, advanced by several parties. (R. Doc. 238).

During the pre-trial proceedings, the Hastert/Republicans and Rosebrook/Democrats submitted and amended statewide redistricting maps, while proposals for the minority districts were made by the Nieves, Chicago Urban League and other plaintiffs. *See Hastert I*, 777 F. Supp. at 638-39 & 641 n.8. However, by court direction, no party could

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[3] Under the Illinois Constitution, the State Board of Elections was created to have "general supervision over the administration of the registration and election laws throughout the State." Ill. Const. 1970, art. III, § 5. The State Board is a bipartisan board of eight members in which no political party has a majority in membership. *Id.*; 10 ILCS 5/1A-2 (1992).

advance more than one plan, leading to the alignment and adoption of the map proposals. *Id.* at 640 & n.4.

The plaintiffs and intervenors entered into stipulations (i.e., the ideal population of a district and the need for four minority districts), and settled differences among themselves to narrow or remove issues. *Id.* at 640. For example, all parties ultimately agreed to an elongated C-shaped configuration for the Hispanic congressional district. *Id.* at 648 & n.24. Also, the Scott intervenors obtained an accommodation from the Hastert/Republicans whose proposed statewide map divided counties in the East St. Louis area and "illegally and intentionally" diluted the votes of African-Americans. (R. Doc. 112). The Hastert plaintiffs—recognizing that this "intervention was caused by something that we inadvertently did" (R. Doc. 227, Ex. A, Tr. at 37)—quickly stipulated with the Scott intervenors to a change in their proposal. (*See* App. 61-62).

The district court presided over a two-day trial in October 1991. On November 6, 1991, the district court issued its decision (*Hastert I*). (R. Doc. 224 & 225). The court declared the existing map unconstitutional and adopted the Hastert/Republican map, while finding that both the Hastert and Rosebrook proposals would have met constitutional and legal requirements had they been enacted by the state legislature. *Hastert I*, 777 F. Supp. at 641 & n.7, 662. The State Board was ordered to implement the new redistricting map, and the parties were ordered to bear their own costs. *Id.* at 662.

Attorneys' Fees

Various plaintiffs and intervenors moved to modify the judgment to permit attorneys' fees and costs under 42 U.S.C. §§ 1973*l*(e) and 1988. (App. 57). On January 17,

1992, the district court's decision denied "prevailing party" status to the Scott and Chicago Urban League parties, but granted such status to the Hastert plaintiffs (whose map was adopted) and the Nieves plaintiffs (who adopted the Republican map and played a role in the creation of the Hispanic district). (App. 61-63; *Hastert v. State Board of Elections*, 794 F. Supp. 254, 259 (N.D. Ill. 1992) ("*Hastert II*")). However, the court went on to deny the award of fees to these prevailing parties, concluding that the legislative and political lobbying process had been shifted to the federal court from the legislature, where expenses were not compensable. According to the district court, neither the purpose of fee-shifting statutes nor the equities in this case would be served by awarding fees. (App. 63-66).

On December 17, 1993 and on June 1, 1994 upon rehearing, a divided panel of the Court of Appeals affirmed in part and reversed in part the attorneys' fees ruling of the district court. (App. 1-29; App. 30-53). The full panel agreed to affirm the prevailing party status of the Hastert and Nieves plaintiffs and, by reversal, to grant such status to the Scott intervenors. (App. 15-21, 25; App. 42-44, 50). On rehearing, the majority alone reversed the status of the Chicago Urban League and ruled that the League also prevailed. (App. 18-21, 25-27). The Court of Appeals compared the winning and losing plaintiffs in order to identify the prevailing parties. (App. 15).

In both of its opinions, the two-member majority of the Court of Appeals reversed the three-judge district court panel's decision to deny fees on special circumstances grounds. (App. 22-24; App. 46-48). The majority deemed the discretion to deny fees quite narrow, and believed the Illinois taxpayers must pay for the legislature's dereliction. (*Id.*). The dissent would have found no abuse of dis-

cretion by the lower court in denying a fee award, believing that an award would be unfair where 1) the State Board played no active or adversarial role and agreed to enforce the judgment, 2) the litigation involved plaintiff groups vying against one another for partisan interests, and 3) the redistricting process had been shifted from the legislature to the federal courts. (App. 27-29; App. 50-53).[4]

On remand, the State Board thus will be exposed to attorneys' fees claims from the Hastert, Nieves, Scott and Chicago Urban League parties who were last represented by eight law firms or organizations before the Court of Appeals. For reference, the Hastert plaintiffs alone had accrued approximately $450,000 in attorneys' fees through the district court's denial of fees. (Hastert Appellants' Br. at 18 n.13). The other three prevailing parties have not indicated their potential fee requests.

[4] With respect to the Rosebrook plaintiffs, the Court of Appeals first ruled that its jurisdiction was limited to the narrow review of the district court's denial of a motion to reconsider a prior order that precluded the pursuit of fees. (App. 67-69; App. 35-36, 41). On rehearing, the Court found that the Rosebrook plaintiffs' notice of appeal had secured review of the merits of the fee decision (App. 13-14), but it concluded that these plaintiffs were not entitled to prevailing party status since their proposal was not adopted. (App. 21-22).

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD GRANT CERTIORARI TO ADDRESS A PLAINTIFF'S ENTITLEMENT TO ATTORNEYS' FEES FROM A NOMINAL AND NEUTRAL STATE DEFENDANT WHEN THE PLAINTIFF HAS PREVAILED ONLY AGAINST COMPETING PLAINTIFFS, IN ORDER TO ENSURE THAT FEDERAL COURTS UNIFORMLY ENFORCE FEE-SHIFTING STATUTES AGAINST DEFENDANTS ONLY IF THEY ARE ACTUALLY FOUND LIABLE FOR VIOLATIONS OF FEDERAL LAW.

Under federal fee-shifting statutes, the factors to be considered in identifying "prevailing party" status in different contexts have been elaborated upon by this Court. *See Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 82 (1989) ("*Garland*") (summarizing case law analysis). While a party's success in the litigation is a general threshold requirement, this Court has recognized that the attorney's fee inquiry must extend beyond a mere claim of victory to an analysis of the nature of the dispute and relief and of the relationship of the winning and losing parties.[5]

This litigation presents the unaddressed question of a nominal defendant's liability for fees when the substan-

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[5] *See, e.g., Kentucky v. Graham*, 473 U.S. 159 (1985) (plaintiff did not prevail against Commonwealth despite successful settlement with employees sued in personal capacities); *Rhodes v. Stewart*, 488 U.S. 1 (1988) (plaintiffs were not prevailing parties with a favorable judgment absent relief that alters defendants' behavior toward plaintiffs); *Christiansburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412 (1978) (plaintiff's action must be frivolous if defendant is to "prevail" for fee purposes); *Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754 (1989) (plaintiffs' success over losing intervenors alone insufficient for fee award).

tive controversy is only between plaintiff groups and "winning" plaintiffs are identified for their relative success against other plaintiffs, rather than against the nominal and neutral defendant. In this category of cases, while some plaintiffs may indeed obtain favorable relief, the rationale for departing from the American Rule on costs by shifting fee liability to one's opponent is absent. Unlike the justification for fee shifting in normal cases, a plaintiff's victory in the present type of case does not represent establishment of the defendant's violation of federal law, and the "losing" opponent is not the defendant. In the context of competing plaintiffs and a neutral defendant, this case asks whether a plaintiff has "prevailing party" status against a nominal defendant when the plaintiff succeeds but the defendant has not "lost".

Fee awards are only permitted when a party has prevailed on the merits. *Hanrahan v. Hampton*, 446 U.S. 754, 758 (1980). From a plaintiff's viewpoint, prevailing party status is obtained by succeeding on "any significant issue in litigation which achieves some of the benefit sought" in bringing suit. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). *See also Garland*, 489 U.S. at 790 (rejecting a requirement to succeed on the "central issue"). In the present case, the Court of Appeals applied only this standard, granting prevailing party status to those plaintiffs whose proposals were adopted, but it acknowledged that the "issue in litigation" was between plaintiffs. (App. 15-21, 42-43). In other words, the court recognized that it was not resolving a plaintiff/defendant dispute.

From a defendant's standpoint, this latter observation is the crucial one. This Court has repeatedly "emphasized the crucial connection between liability for violation of federal law and liability for attorney's fees." *Zipes*, 491 U.S. at 762. Where a defendant has not been prevailed against,

federal fee-shifting statutes do not authorize an award against that defendant. *Farrar v. Hobby*, ____ U.S. ____, 113 S. Ct. 566, 572 (1992); *Kentucky v. Graham*, 473 U.S. at 165. In order to "prevail" against a particular defendant, the plaintiff must be able to point to a resolution of the dispute that materially alters the legal relationship between itself and the defendant. *Farrar*, ____ U.S. at ____, 113 S. Ct. at 572-73; *Garland*, 489 U.S. at 792-93; *see Rhodes v. Stewart*, 488 U.S. 1, 3-4 (1988); *Hewitt v. Helms*, 482 U.S. 755, 761 (1987).

The latter standards, if applied in a case such as this, defeat prevailing party status as against a nominal defendant, despite some plaintiffs' achievement of relief relative to other plaintiffs. Here, the Seventh Circuit made no finding of federal law violation against the defendant, and the litigation resolved only the disputes existing between plaintiffs.

From the inception, the State Board stood willing to implement a new and valid redistricting plan without the necessity of a judgment against it. (R. Doc. 83). *Cf. Farrar*, ____ U.S. at ____, 113 S. Ct. at 574 (judgment for nominal damages modifies defendant's behavior because it forces defendant to pay money he otherwise would not pay). The litigation settled which proposal would be implemented given the "parochial interests and partisan concerns" of the competing plaintiffs (App. 65)—the same competing interests that prevented a legislative resolution.

In enacting fee-shifting statutes, Congress intended that the plaintiff serve as its chosen instrument in vindicating a policy of high priority against the violator of federal law. *See Christiansburg*, 434 U.S. at 418. Policy considerations of fee-shifting statutes are not served in cases such as this, where the plaintiffs litigate their otherwise political disputes.

The imposition of fees in this matter raises theoretical and very practical aspects of fee-shifting statutes, such as: 1) how will the reasonableness of claimed attorney time be determined when one plaintiff "prevails" over other plaintiffs?; 2) would the latters' disinterest in compromise permit the prevailing party to obtain compensation for succeeding over a perhaps unreasonable opponent in order to inexplicably punish the State Board?; 3) how does the State Board identify for itself and the district court any non-compensable hours, when the Board, which lacks the redistricting authority, holds no historical knowledge of the litigation and could not, for example, have extracted a compromise or made an offer of judgment, pursuant to Rule 68 of the Federal Rules of Civil Procedure?; and 4) if plaintiffs may prevail between themselves and yet never be exposed to an opponent's fees, what disincentive to litigation exists when the State Board must pay the fees?

While the State Board recognizes that attorneys' fees have been awarded in redistricting cases, none of those decisions has examined prevailing party status in light of the more limited standards pronounced by this Court since 1985. *See, e.g., In re Illinois Congressional Districts*, 704 F.2d 380 (7th Cir. 1983); *In re Kansas Congressional Districts Reapportionment Cases*, 745 F.2d 610 (10th Cir. 1984). This Court is, therefore, urged to grant a writ of certiorari to examine this aspect of the availability of attorneys' fees awards on the basis of prevailing party status.

II.

THE LOWER COURTS REQUIRE DIRECTION ON THE PARAMETERS OF THE JUDICIALLY-CREATED EXCEPTION TO THE GRANT OF ATTORNEYS' FEES WHEN FOUR OF SIX FEDERAL JURISTS WOULD HAVE DENIED FEES AS UNJUST AND THE TWO-MEMBER MAJORITY DISAGREED.

Even if some plaintiffs had obtained prevailing party status through their litigation, the three-judge district court held discretion to deny an award of fees. When circumstances would render an award unjust, the court may withhold fees from a prevailing party. *Hensley*, 461 U.S. at 429; *Farrar*, ____ U.S. at ____, 113 S. Ct. at 576-77 (O'Conner, J., concurring). *See Zipes*, 491 U.S. at 760 ("[I]n some circumstances, the interests of the losing party *trump* those of the prevailing party.").

Ignoring the abuse of discretion standard requiring affirmance if any rational person could agree with the district court, the two-judge majority plainly refused to recognize the three-judge district court's conclusion, with which the dissent would have concurred. On the same set of facts, six federal jurists have spoken on the application of the special circumstances exception to awarding fees and arrived at opposite conclusions, exemplifying the need for this Court's direction.

For example, the majority was willing to accept as true the district court's conclusion that the plaintiffs' lobbying efforts had been shifted from the legislative to the federal judicial forum. (App. 23). Nevertheless, it obliterated the special circumstances exception by finding that a state agency *may* be liable for the prevailing parties' fees. (*Id.*, citing *Hutto v. Finney*, 437 U.S. 678, 694 (1978)). The majority failed to recognize that the exception must exist despite plaintiffs' prevailing status and the defen-

dant's lack of immunity under *Hutto*, or it would have no meaning.

While the State Board contends that the true nature of the plaintiffs' litigation should have prevented prevailing party status as against the nominal defendant, the district court and the dissenting appellate judge viewed the particular characteristics of this type of litigation as justification for withholding a fee award. Addressing the parameters of the special circumstances exception would avoid the confusion over its application and curtail unnecessary fee litigation.

CONCLUSION

For these reasons, the Illinois State Board of Elections and the Board members respectfully ask this Court to issue a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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